> the Attorney General the existing bond shall be surrendered and a new bond in greater or lesser amount or other conditions shall be furnished. *The bill intends that the Attorney General shall have untrammeled discretion to impose such conditions or terms as he sees fit in releasing an alien under bond * * * pending final determination of the deportability of the alien * * *.*[2]

H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949) (emphasis added); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added).

Despite the failure of H.R. 10 to pass, it was, as this Court recognized in *Carlson* v. *Landon*, 342 U.S. at 538, the progenitor of Section 23 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1011. Section 23 specifically amended former 8 U.S.C. 156 to contain the exact language that H.R. 10 would have enacted. In 1952, when Congress comprehensively revised the immigration laws, (ch. 477, 66 Stat. 163), former 8 U.S.C. 156 was replaced by Section 242(a) of the new Act, now codified at 8 U.S.C. 1252(a)(1). That Section provides that an alien may be released on bond "with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe." The language specifying that "[i]t shall be among the conditions" that the alien appear was not carried into the statute, but the legislative history indicates that Section 1252(a)(1), "in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950." H.R. Rep. No. 1365, *supra*, at 57.[3]

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[2] The House report also stated more generally that one purpose of the bill was to "return without doubt to the political (executive) branch of the Government certain functions in connection with the exclusion and expulsion of aliens which historically have been vested in that branch, rather than the judiciary." H.R. Rep. No. 1192, *supra*, at 4.

[3] The Subversive Activities Control Act of 1950 is Title I of the Internal Security Act of 1950, and references to Section 23 of either Act are to the same provision.

2. The Immigration and Naturalization Service (INS) has been delegated authority to act on behalf of the Attorney General in matters relevant to this case. See 8 C.F.R. 2.1. Before INS promulgated the regulation challenged in this action, district directors had to obtain prior approval from INS regional commissioners in order to impose a condition in an alien's release bond that the alien refrain from unauthorized employment pending completion of the deportation proceeding. 8 C.F.R. 103.6 (a)(2)(ii) (1983). In March 1983, INS proposed to simplify that cumbersome procedure by including a condition prohibiting unauthorized employment in every "appearance and delivery bond in connection with a deportation proceeding or bond posted for release of an alien in exclusion proceedings, unless upon application by the alien the District Director determines that employment is appropriate" in light of certain specified factors.[4] 48 Fed. Reg. 8820-8821 (1983). INS explained that the re-

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[4] The regulation set forth factors to be considered in the exercise of discretion concerning whether to grant work authorization, including the safeguarding of employment opportunities for American citizens, prior violations of the immigration laws by the alien, whether an American citizen or lawful permanent resident is dependent on the alien for support, and whether there are other equities that should be considered. See 48 Fed. Reg. 51,144 (1983) (8 C.F.R. 103.6(a)(2)(iii) and 109.1(b)(8)); App. 123a, 148a. The authority proposed to be given to district directors under these regulations would be in addition to the district directors' preexisting authority, 8 C.F.R. 109.1(b)(1)-(7) (1983), to grant work authorization to aliens who are in certain specified statuses or have applied for or been granted certain specified benefits.

During the pendency of this litigation, various regulations regarding alien work authorization—including 8 C.F.R. 109.1 (1984)—were amended and recodified at 8 C.F.R. 274a.12; App. 127a-136a. Subsections (a) and (b) of this new section set forth a listing of the numerous immigration statuses that automatically convey work authorization. Subsection (c) sets forth numerous provisions, such as the one at issue here, under which aliens may apply for work authorization. The specific provision regarding temporary work authorizations for aliens pending deportation proceedings (former 8 C.F.R. 109.1(b)(8) (1984)) now appears, with some elaboration as to the factors to be considered in granting such relief, as 8 C.F.R. 274a.12(c)(13). App. 135a-136a.

visions were "consistent with the general principle that employment of aliens in the United States is to be strictly controlled to safeguard the interest of U.S. citizens and permanent resident aliens." 48 Fed. Reg. 8820 (1983).

In November 1983, INS published a revised, final regulation. An accompanying explanation addressed the concerns raised in the public comments that had not been addressed by revisions to the regulation. 48 Fed. Reg. 51,142-51,144 (1983); App. 137a-149a. Responding to the most significant misapprehension expressed, INS explained that the regulation would not diminish any employment authorization that an alien already had because it barred only "working without authorization"—*i.e.*, "unauthorized work [that] is a continuing violation of the immigration laws." 48 Fed. Reg. 51,142 (1983); App. 139a. The regulation would not affect citizens or permanent resident aliens (who have authorization to work by virtue of their status). 48 Fed. Reg. 51,143 (1983); App. 142a-143a. Nor would the regulation affect asylum applicants who file nonfrivolous applications, since another regulation, 8 C.F.R. Pt. 208; see also 8 C.F.R. 274a.12(c)(8), governs employment authorization for such aliens. 48 Fed. Reg. 51,143 (1983); App. 143a. The primary effect of the regulation, the INS explained, is to place on the alien who wishes to avoid a no-unauthorized-work rider on his release bond the burden of seeking employment authorization from the district director. 48 Fed. Reg. 51,143 (1983); App. 141a. By placing that burden on the alien, INS intended to remove an economic incentive for illegal entry, and also to remove an incentive to delay deportation proceedings when an alien is apprehended. Acknowledging that fewer bonds might be written and that more aliens might be detained in custody under the new regulation, INS stated that these were acceptable costs in the effort to safeguard employment for U.S. citizens and permanent resident aliens. 48 Fed. Reg. 51,143 (1983); App. 141a.

3. On December 6, 1983, one day before the new regulation was to take effect, respondents filed this action challenging its validity on a variety of statutory and constitutional theories.[5] Ten days later, the district court issued a nationwide preliminary injunction prohibiting implementation of the regulation. App. 109a-118a. The basis for this ruling was that respondents had a "fair chance" of success on their arguments that 8 U.S.C. 1252(a) does not authorize a condition on release bonds that is unrelated to ensuring the alien's appearance and that the regulation deprives aliens of their due process rights by denying them the right to work until deportability is finally determined. App. 115a. On appeal, the court of appeals affirmed in part and reversed in part. *Id.* at 96a-108a. The court held that a nationwide injunction was improper in the absence of class certification, but agreed with the district court that the respondents had a "fair chance" of succeeding on the merits of their statutory argument and affirmed the injunction. *Id.* at 107a. The court remanded for further proceedings on the question of class certification, as well as on respondents' request for permanent relief. *Id.* at 107a-108a.

On remand, the district court certified a nationwide class and entered a nationwide permanent injunction. App. 81a-95a. The sole ground for the district court's ruling was that the regulation exceeded the statutory authority granted in 8 U.S.C. 1252(a). App. 84a, 95a. Although the court acknowledged that the condition prohibiting unauthorized employment does "further the broad purposes of the Immigration and Nationality Act," App. 85a, and acknowledged that the plain language of

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[5] Plaintiffs named in the original complaint were 13 nonprofit organizations providing free legal services to aliens with immigration problems, a local United Auto Workers Union affiliate, six named aliens held in detention, and one unnamed alien who claimed to be deterred from filing for benefits by fear that the new regulation would result in indefinite detention. Clerk's Record, Docket Entry 1, at 5-9. In an amended complaint, filed on December 16, 1983, one of the alien plaintiffs held in detention was dropped and ten alien plaintiffs were added. E.R. 8-17. Four of the additional plaintiffs alleged that a "no-work" condition had been included in their release bonds; six alleged that they were then in detention.

the statute "appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien under bond," *id.* at 87a, it nevertheless held that bond conditions must be limited to ensuring the alien's appearance at deportation proceedings, *id.* at 88a-89a, 92a. Quoting the earlier court of appeals opinion, the district court relied on this Court's opinion in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 892-893 (1984), to characterize unauthorized employment by aliens as only a "peripheral concern" of the immigration laws. App. 92a. The court further faulted the regulation for "inherently preclud[ing] any individualized determination," *id.* at 85a, and held that "the discretion of the Attorney General does not extend to the blanket imposition of a no work condition on all aliens who are released on bond," *id.* at 95a.[6]

The court of appeals affirmed. App. 71a-80a. Like the district court, the court of appeals acknowledged the breadth of the statutory language, but held that "legislative history, prior legislation, and case law limit the allowable conditions to those that tend to insure the appearance of the alien in future proceedings." *Id.* at 77a. The court reiterated the view, expressed in its earlier opinion, that the INA is not primarily concerned with employment of aliens and that such a purpose would not support the no-unauthorized-work condition on release. App. 79a-80a. The court of appeals also endorsed the district court's reasoning that the Attorney General must

[6] The scope of the district court's injunction, which remains in effect, is not entirely clear. For example, it is not clear whether the district court intended to bar implementation of 8 C.F.R. 103.6(a)(2) only, or also enjoined implementation of simultaneously proposed changes, beneficial to aliens, in 8 C.F.R. 109.1 (1984) (now recodified at 8 C.F.R. 274a.12(c)(13)). It is also unclear whether the district court intended to prohibit continued use of the prior version of the regulation, which permitted no-unauthorized-employment conditions on a case-by-case basis. Subsequent rulings, including the court of appeals' most recent opinion, have done nothing to alleviate these uncertainties.

proceed by "individualized determinations rather than the imposition of a blanket condition." *Id.* at 80a.

Because this ruling seriously restricted the Attorney General's discretion to impose conditions in bonds issued to effect the release of aliens pending deportation proceedings, and because the nationwide character of the injunction precluded further litigation in other circuits, the Solicitor General petitioned this Court for a writ of certiorari. Meanwhile, subsequent to the entry of the court of appeals decision, Congress had enacted IRCA. Respondents relied on the passage of IRCA to oppose the petition, arguing that it would make review of the regulation "academic."[7] This Court issued an order granting the writ, vacating the judgment of the court of appeals, and remanding the case "for further consideration in light of the Immigration Reform and Control Act of 1986." 481 U.S. 1009, 1009-1010 (1987).

The court of appeals then remanded the case to the district court, and that court issued an order reaffirming its grant of summary judgment and declining to revise its assessment of the legal issues in light of IRCA. App. 66a-70a. The court acknowledged that IRCA makes the question at hand "a more difficult one," App. 70a, but adhered to its earlier view that the legislative history of 8 U.S.C. 1252(a)(1) limits permissible release conditions to those "aimed at obtaining an undocumented worker's appearance at future immigration proceedings," App. 68a. The court also reiterated its criticism that the regulation was a "blanket no-work provision that is devoid of individualized determinations as to employment status." *Id.* at 69a.

On appeal, a divided panel of the court of appeals affirmed the district court. App. 1a-60a.[8] In light of an

[7] See Opposition to Petition for a Writ of Certiorari at 10, in No. 86-1207 (filed Mar. 31, 1987).

[8] Prior to issuing its ruling on the merits of this appeal, the court of appeals published an opinion rejecting respondents' suggestion that it lacked appellate jurisdiction because the govern-

intervening ruling by another panel of the same court,[9] the majority was constrained to recognize that bond conditions are not limited to "the *sole* purpose of ensuring appearance at deportation hearings." *Id.* at 22a-23a. By a somewhat modified and lengthier route, however, the court of appeals arrived at essentially the same result as it had prior to this Court's remand. After distinguishing the precedent noted above, the panel majority used a two-step process to arrive at the conclusion that employment considerations cannot justify bond conditions under 8 U.S.C. 1252(a)(1). First, after reviewing earlier INS practice and the policies of IRCA, the majority concluded that the Attorney General cannot use detention to combat problems of unlawful employment. App. 47a; see also *id.* at 35a (Attorney General has "no authority for *detention* in relation to unauthorized employment"). Second, the majority held that "where there is no power to detain, conditions must be related to ensuring the alien's appearance." *Id.* at 54a.

The court of appeals' opinion also relies heavily on the conclusion that bond conditions must be based on individualized administrative proceedings rather than on application of a general rule. The majority discussed at length prior cases dealing with the need for such individualized determinations in cases of aliens detained as security risks, App. 25a-33a, and concluded that bond conditions "must be based on specific facts regarding the individual" in question. *Id.* at 57a. It accordingly ruled that the "blanket condition" represented by the rule at issue would not pass muster, in its view, "even if unauthorized employment were ground for detention." *Id.* at 57a-58a.

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ment's notice of appeal did not list the respondents by name. App. 61a-65a.

[9] See *Flores* v. *Meese*, 906 F.2d 396, amended, 913 F.2d 1315 (9th Cir. 1990), withdrawn on grant of reh'g en banc, No. 88-6249 (Nov. 19, 1990).

Judge Trott dissented. App. 58a-60a. Viewing the proper analysis as "uncomplicated," he found that the bond conditions INS seeks to impose by rule are rationally related to "[a]n unmistakable purpose of the [INA]"—*i.e.*, " 'to preserve jobs for American workers.' " *Id.* at 58a (quoting *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. at 893). He also reasoned that this purpose was "fortified" by IRCA, and characterized the majority's attempt to find support for its position in IRCA as "thoroughly unpersuasive." App. 59a. Because the regulations at issue would further the goal of preventing continued illegal employment by aliens awaiting deportation proceedings, Judge Trott concluded that "the majority opinion improperly invades the province of the Attorney General." *Ibid.*

REASONS FOR GRANTING THE PETITION

Little has changed since this Court granted certiorari and remanded the case four years ago. The court of appeals has again affirmed a ruling greatly restricting the Attorney General's statutory discretion in an important area of immigration law, and has done so on grounds having no basis in the statutory language. The nationwide character of the injunction, moreover, "foreclos[es] adjudication by a number of different courts and judges," *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979), and forces INS to seek this Court's review without the benefit of additional consideration in the lower courts.

The lower courts' erroneous assertion of subject matter jurisdiction provides an independent basis for review. The INA limits review of "any determination * * * concerning * * * release on bond" to individual habeas corpus proceedings. 8 U.S.C. 1252(a)(1). In rejecting the government's argument that this provision precludes the exercise of jurisdiction in this action, the court of appeals relied entirely on the reasoning of lower court decisions holding that federal question jurisdiction is

available in actions alleging a "pattern and practice" of misconduct by the INS. Since the force of those cases may be undermined by this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332 (argued Oct. 29, 1990), the Court should hold this petition for disposition in light of the decision in that case.

1. The jurisdiction of the lower federal courts is controlled by statute. *Finley* v. *United States*, 109 S. Ct. 2003, 2006 (1989); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another."). The statute governing judicial review of challenges to bond conditions, 8 U.S.C. 1252(a)(1) (emphasis added), provides:

> Any court of competent jurisdiction shall have authority to review or revise *any determination* of the Attorney General *concerning* detention, *release on bond*, or parole pending final decision of deportability upon a conclusive showing *in habeas corpus proceedings* that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

By its terms, Section 1252(a)(1) limits review or revision of "any determination" of the Attorney General "concerning * * * release on bond" to individual "habeas corpus proceedings," and authorizes relief in such proceedings only on a showing that the Attorney General is not proceeding with "reasonable dispatch" in determining the alien's deportability. The legislative history emphasizes that individual habeas corpus proceedings are the exclusive means of review:

> An alien arrested and taken into custody may, pending the final determination of deportability, be continued in custody, released on bond or released on conditional parole, and the determination of the Attorney General concerning such detention, release on bond or parole shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch to determine deportability.

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57 (1952) (emphasis added).

The court of appeals recognized that "[s]ince this suit was not brought as a habeas corpus action pursuant to section 1252(a)," App. 100a-101a, jurisdiction was not authorized by that Section. Rather than order dismissal of the action for lack of subject matter jurisdiction, however, it invoked federal question jurisdiction under 28 U.S.C. 1331 and 8 U.S.C. 1329. App. 101a. To justify this conclusion, the court of appeals relied on decisions of other courts of appeals purporting to create a "pattern and practice" exception to the provision governing administrative review of immigration determinations, 8 U.S.C. 1105a. App. 5a, 101a.

In *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332 (argued Oct. 29, 1990), we stated that "those cases, in our view, are wrongly decided." U.S. Br. at 26 in No. 89-1332. The two leading cases—both cited by the court of appeals below, see App. 5a—are *Haitian Refugee Center (HRC)* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), and *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985).[10] While the Fifth Circuit asserted in *HRC* that district courts may draw upon their "equitable

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[10] This Court ultimately affirmed the judgment in *Jean* v. *Nelson* without discussing the jurisdictional issue. The question presented by the petition in *Jean* was whether unadmitted aliens could invoke the equal protection guarantee of the Fifth Amendment's Due Process Clause. The Court, in affirming, did not reach that question because it held that nonconstitutional grounds for decision should be considered further on remand. *Jean* v. *Nelson*, 472 U.S. at 853-857. Since neither the parties nor the Court addressed the jurisdictional issue, the decision cannot be understood to constitute endorsement of the theory espoused by the lower court. See *Hagans* v. *Levine*, 415 U.S. 528, 535 n.5 (1974); cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1064-1065 (1990).

powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged," 676 F.2d at 1033, and the Eleventh Circuit in *Jean* extended that principle to statutory claims, 727 F.2d at 980 n.32, this Court has stressed that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law," *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988). *HRC* and *Jean* advanced various policy reasons for circumventing the scheme for judicial review set forth in 8 U.S.C. 1105a, but "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 311 (1989). The "pattern and practice" exception is particularly unmanageable because it contains no clearly delineated boundaries. "Although the Fifth Circuit emphasized the narrowness of its holding and promised not to condone any 'end-run around the administrative process,' the application of *HRC* v. *Smith* has proliferated to the point where it now more nearly resembles a gaping hole in the middle of INS's defensive line." *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1336 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018 (filed Dec. 27, 1989). The present case illustrates the lack of any limiting principle; unable to find in the governing statute any jurisdictional basis for respondents' challenge, the court of appeals simply extended the "pattern and practice" exception to bond determinations and proceeded to the merits.

We challenge the reasoning of the Fifth Circuit in *HRC* v. *Smith* and the Eleventh Circuit in *Jean* v. *Nelson*, and defend the contrary analysis of the D.C. Circuit in *Ayuda* v. *Thornburgh*, in our submission to this Court in *McNary* v. *Haitian Refugee Center*, No. 89-1332.[11] The court of appeals here relied entirely on the "pattern and

[11] We also argue in that submission that, in any event, the particular statutory provision at issue in *McNary* v. *Haitian Refugee Center* (8 U.S.C. 1160(e)) precludes the "pattern or practice" action in that case.

practice" line of cases in concluding that "[t]he district court had jurisdiction since NCIR challenged the blanket provision on constitutional and statutory grounds and did not seek a review on the merits of any individual determination regarding release on bond." App. 5a. Because this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332, may affect the subject matter jurisdiction of the district court, the Court should hold the petition for disposition in light of that decision.

2. Even if the district court had subject matter jurisdiction over respondents' nationwide class action, the courts below erred in holding that the Attorney General could not protect American laborers by imposing, as a condition of release on bond, a prohibition on unauthorized employment.

a. "One of the main reasons [aliens] come [to the United States illegally]—perhaps the main reason—is to seek employment." *INS* v. *Delgado*, 466 U.S. 210, 223 (1984) (Powell, J., concurring). This Court has recognized that "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. at 893. In its effort to implement the alien employment restrictions in the INA, INS continually seeks reasonable and efficient enforcement mechanisms that will discourage illegal immigration by removing the economic incentive for aliens to enter or remain in this country without proper authorization. As Justice Powell has observed, the government interest in such mechanisms can be "enormous." *Delgado*, 466 U.S. at 223 (Powell, J., concurring).

In a variety of contexts related to the enforcement of alien employment restrictions, the Court has recognized the importance to the government of similar enforcement techniques. For example, in *INS* v. *Delgado*, the Court rejected a Fourth Amendment challenge to INS's factory surveys when the surveys were conducted pursuant to warrants based on probable cause to believe that illegal aliens were employed on the premises. And in *Sure-Tan, Inc.* v. *NLRB*, the Court sustained the applicability of

the National Labor Relations Act's protection against unfair employment practices to undocumented alien employees. The Court reasoned that

> [a]pplication of the NLRA helps to assure that wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.

467 U.S. at 893-894.

The effect of the challenged regulation is similar to the effect of conducting factory surveys or of applying the NLRA to undocumented alien workers. The regulation is designed to discourage entry for the purpose of engaging in unauthorized employment and to discourage aliens who are apprehended (on probable cause of unlawful presence in this country) from delaying determinations of deportability. Without the imposition of such a release condition, the alien has a strong incentive to prolong deportation proceedings and delay a final determination while he continues to work.[12]

It is a sound use of its limited resources for INS to impose a general condition on release that, in effect, commands aliens not to violate the law by working without authorization. That is what the present regulation ac-

[12] This Court has recently had occasion to comment that "[o]ne illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation as long as possible." *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). The denial to INS of a mechanism to enforce the Act's prohibition on employment obviously enhances that incentive.

complishes: it provides that an alien who is apprehended on probable cause to believe that he is unlawfully in this country, and who is released on bond while awaiting a determination of deportability, must refrain from engaging in unauthorized employment.

Contrary to the court of appeals' supposition, App. 7a-13a, INS has consistently maintained that the regulation does not ban *all* employment—only employment that is "unauthorized."[13] For example, while permanent resident aliens may become subject to deportation proceedings for various reasons, employment of those persons is authorized by law, and their employment remains "authorized" until such time as they lose their permanent resident status.[14] See 48 Fed. Reg. 51,143 (1983); App. 142a-143a. In practice, the regulation would simply shift to an apprehended alien the burden of demonstrating that he has received authorization to engage in employment. Such a requirement will impose no burden on authorized employment in the vast majority of cases. If an alien is entitled to work by virtue of his status or individual authorization by a district director, proof of that fact should be readily available,[15] and the condition will not

[13] To the extent that there is any ambiguity in the regulation in this respect, the court of appeals' refusal to accept INS's reading of it was altogether improper—and especially so in light of the fact that the regulation was held to be invalid on its face before INS had an opportunity to implement it. See generally *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (courts must defer to agency's construction of its own regulations). This case, however, goes well beyond the court of appeals' misreading of the regulation. Regardless of how the regulation is interpreted, the court of appeals' restrictive reading of the statute interferes improperly with the Attorney General's discretion and warrants this Court's attention.

[14] Other statuses that automatically confer employment authorization are set forth at 8 C.F.R. 274a.12(a) and (b). App. 127a-132a.

[15] For example, lawful permanent resident aliens are issued "green cards," which they are required to carry with them at all times as evidence of their status. See 8 U.S.C. 1304(e); 8 C.F.R. 211.1(b); *Saxbe* v. *Bustos*, 419 U.S. 65, 68 (1974). Other aliens holding a status authorizing them to work, see 8 C.F.R. 274a.12(a)

apply. Thus, the challenged regulation does not eliminate any right to work that an alien may already have. Indeed, the regulation at issue includes a new, individualized opportunity for an apprehended alien to apply to a district director for employment authorization pending deportation proceedings. See 8 C.F.R. 274a.12(c)(13) (formerly 8 C.F.R. 109.1(b)(8) (1984)).

In short, the regulation is fully consistent with the objectives of the INA and with decisions of this Court upholding other efforts to further those objectives. Used in tandem with enforcement techniques the Court has already sanctioned, and with the employer sanction provisions of IRCA, this regulation significantly enhances INS's enforcement efforts and furthers the goal of discouraging illegal immigration.

b. The court below erred in holding that the regulation exceeds the Attorney General's statutory authority.

i. Two statutory provisions—one specific, one general—support the Attorney General's authority to issue

(listing statuses conferring general work authorization), will have that status "evidenced by an employment authorization document issued by the [INS]." Aliens in a status entitling them to limited work authorization, 8 C.F.R. 274a.12(b), will generally have that status reflected in a visa, 8 C.F.R. 212.1, or border crossing card, 8 C.F.R. 212.1(c). Moreover, each alien's evidence of registration has an "A" number, which can be given to INS to ascertain the alien's status. Thus, an alien who is permitted to work under the Act should have no difficulty demonstrating that fact to INS officials responsible for releasing the alien on bond.

Admittedly, there will be rare cases where unusual circumstances make it difficult to ascertain status. See, *e.g.*, *Liacakos* v. *Kennedy*, 195 F. Supp. 630 (D.D.C. 1961) (factual dispute regarding place of birth, where no birth certificate could be found). While we do not believe that the validity of the regulation is affected by its application in such cases, this is one reason why we do not share the view of the dissent below that the present controversy could be resolved by clarification of the regulation. See App. 59a-60a. Furthermore, we see no indication that the court of appeals majority would be "willing to go along with" a regulation so clarified, *id.* at 60a, in light of its conclusions that unauthorized employment cannot justify detention and that all bond conditions must be imposed pursuant to individualized determinations. *Id.* at 57a-58a.

the regulation challenged in this case. The first provision, 8 U.S.C. 1252(a)(1), is specifically concerned with the apprehension and detention of aliens pending deportation proceedings. It provides:

> Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2) [regarding mandatory detention of aliens convicted of aggravated felonies], any such alien taken into custody may, *in the discretion of the Attorney General* and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, *containing such conditions as the Attorney General may prescribe*; or (C) be released on conditional parole. But such bond or parole, where heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability.

8 U.S.C. 1252(a)(1) (emphasis added).

The second provision, 8 U.S.C. 1103(a), confers on the Attorney General broad powers to administer and enforce the INA:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens * * *. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; *and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.* * * *

8 U.S.C. 1103(a).

The court of appeals made only a passing nod at the language of the statute before holding that it does not mean what it says. Despite acknowledging that the statute "'was meant to confer broad power upon the Attorney General to detain aliens prior to a final determination of deportability,'" and that the Attorney General has "'broad discretion in acting to fulfill the purposes of [the immigration] laws,'" App. 22a (quoting *Flores*, 913 F.2d at 1325), the court went on to rule that detention cannot be used in conjunction with efforts to combat unauthorized employment, and that the bond conditions called for by the regulation at hand are impermissible.

No language in the INA limits the Attorney General's discretionary detention and bond authority to uses concerning the alien's appearance at subsequent proceedings. By contrast, the provisions of the Criminal Code governing bonds in criminal cases specifically enumerate both the permissible conditions of release and the purpose to be served by those conditions. 18 U.S.C. 3142(c), (g), and (h).[16] In the very context of release on bond pending deportation proceedings, Congress at one time limited the allowable conditions to those designed to ensure appearance, 8 U.S.C. 156 (1940), but that statute has been repealed in favor of the present provision. Thus, the broad language of 8 U.S.C. 1252(a)(1) must mean that Congress intended the Attorney General to have wider authority to impose any conditions reasonably related to the broader purposes of the Act.

This conclusion is confirmed by the legislative history of 8 U.S.C. 1252(a)(1). As explained above, ch. 1024, § 23,

[16] Notably, Congress has determined that the bond of a person charged with a crime must condition release on the person's not committing any crime while on release. 18 U.S.C. 3142(c)(1). Although Congress has not made it mandatory that the bond of a person charged with an immigration violation condition release on the person's not committing further immigration violations, that is hardly a basis for concluding that the broad language of 8 U.S.C. 1252(a)(1) prohibits the Attorney General from imposing a limited, specific condition of this kind.

64 Stat. 1011, (the predecessor of 8 U.S.C. 1252(a)(1)), was originally proposed in H.R. 10, a bill that did not pass. The language of H.R. 10, however, was incorporated in Section 23, and the legislative history of that Section is contained in the reports accompanying H.R. 10. Those reports (quoted at pp. 5-6, *supra*) signal a clear congressional intent to give the Attorney General "full discretion" and "untrammeled authority" to impose conditions other than a condition that the alien appear for deportation proceedings. Indeed, Congress could not have been more explicit in stating its intent to grant the Attorney General broad power to impose bond conditions.[17]

ii. The court of appeals' reasons for ignoring the statute's clear language are altogether inadequate. In concluding that the Attorney General has "no authority for *detention* in relation to unauthorized employment," App. 35a, the court relied in large part on prior practice of the INS, which did not impose employment riders on bonds prior to the mid-1970s and then did so only on a case-by-case basis, *id.* at 33a-37a. This discussion, however, shows at most that the promulgation of the regulation at issue represented a new *policy* choice by INS regarding the way in which it would exercise its statutory authority. This Court has recognized that the very nature of administrative discretion requires that agencies be permitted to alter policies, within statutory bounds, to accommodate "changing needs." See *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967). The broad authority that the statute has

[17] The court of appeals in an earlier opinion relied on a listing of examples in the legislative history, as support for the proposition that only appearance-related conditions are permitted. App. 77a-78a. Although it is true that the examples contained in the legislative history relate to ensuring appearance, "the language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990).

always provided fully entitles the INS to determine, on reassessment of the vexing problem of unlawful employment, to make a shift in its policy on release conditions.[18]

The court of appeals also erred in its reliance on IRCA, App. 37a-48a, as limiting the Attorney General's discretion. While IRCA "fortifie[s]" the conclusion that the protection of American labor is at the heart of the purposes of the immigration laws, see *id.* at 59a (Trott, J., dissenting), it did not alter the broad grant of authority in 8 U.S.C. 1252(a)(1), and INS has not relied on it as a source of its authority to promulgate the regulation at issue. IRCA simply does not address the issue of release on bond, nor the conditions that may be attached to such release.

By the same token, Congress's rejection in 1986 of *additional* sanctions on unlawfully employed aliens cannot warrant a conclusion that it intended to restrict previously enacted authority.[19] While the court of appeals majority correctly noted that IRCA represents a "carefully crafted political compromise" to take new steps to

[18] The court of appeals was mistaken in citing the Attorney General's decision in *In re Toscano-Rivas*, 14 I. & N. Dec. 550 (A.G. 1974), solely for the proposition "that individualized determinations with structured review procedures were necessary" for the imposition of work conditions. App. 37a. The court ignored the significance of the Attorney General's affirmance in that opinion of his authority, under both 8 U.S.C. 1252(a)(1) and 8 U.S.C. 1103(a), to impose riders on release bonds prohibiting unauthorized employment. 14 I. & N. Dec. at 556.

[19] As noted by the court of appeals, App. 42a, the "employee sanctions" that Congress considered and rejected in the course of enacting IRCA would have entailed jail terms for unauthorized work. See *Immigration Reform and Control Act of 1985: Hearings on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 44-45 (1985). Such punitive sanctions would be altogether different from detention under the present regulation—detention that is limited to the duration of deportation proceedings, that occurs only if the alien violates the bond condition, and that can always be avoided by a decision to accept voluntary departure.

fight the problem of employment by illegal aliens, App. 38a, IRCA was enacted against a backdrop of existing provisions that Congress did not alter. The regulation at issue does not conflict with any provision of IRCA, and there is no basis for the court of appeals' assertion that it is somehow "contrary to a congressional policy" choice. *Id.* at 47a.

c. As noted above, the court of appeals' most recent opinion relies more extensively on the notion, expressed by previous panels, that the regulation is improper because it represents a "blanket" imposition of a condition on release bonds that precludes "individualized determinations." See App. 26a-32a, 54a-58a. This notion, like the holding that detention cannot be used with respect to employment concerns, is without foundation in the statute.[20]

Contrary to the court of appeals' understanding, the regulation contemplates at least two types of individualized determinations. The first relates to INS's stated intent to apply the regulation, in accordance with the language of its heading, only to "unauthorized employment." As noted above, this would entail an initial, informal determination whether the alien could establish that he was authorized to work. See note 15, *supra*. Second, the regulation affords an opportunity for an arrested alien released on bond to obtain an individualized determination whether employment should be authorized. 8 C.F.R. 274a.12(c)(13); App. 135a-136a.

The court of appeals nevertheless concluded that the regulation, in imposing a "blanket condition," violated the statute. App. 17a-18a, 25a-33a. Nowhere, however,

[20] Although the court of appeals' ruling is not crystal clear, the "individualized determination" issue appears to be an alternative rationale for the court's holding. After elsewhere concluding that there is no authority for the use of detention in connection with employment concerns, App. 47a, 54a, the court also concluded that a "blanket" condition would be impermissible "even if unauthorized employment were grounds for detention," *id.* at 57a.

did the court even attempt to find in the language of the statute a basis for its requirement that the Attorney General's discretion regarding bond conditions "must be exercised upon facts shown about each detained individual." *Id.* at 28a. The promulgation of rules has long been recognized as consistent with a grant of statutory discretion and with an opportunity for a hearing. As Judge Friendly reasoned in *Fook Hong Mak* v. *United States*, 435 F.2d 728 (2d Cir. 1970):

> We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary powers, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering.

Id. at 730. In this case, the statute gives the Attorney General discretion to impose "such conditions as [he] may prescribe" on releases on bond. The statute is silent as to whether such conditions should be "prescribed" in individualized proceedings or "prescribed" by rule. Accordingly, under well-established principles, INS is free to narrow its discretion by rule. See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 297 (1974). There is simply no basis for a conclusion that the statute requires INS to address each and every issue regarding bond conditions in individualized proceedings or precludes the promulgation of rules governing those conditions.[21]

The court of appeals relied in this regard on lower court decisions involving denials of bail to individuals claimed to be subversive or otherwise to pose risks to

[21] The court of appeals' insistence that bond conditions can be imposed only in individualized proceedings, and cannot be established by a rule subject to waiver in individual cases, appears to be based at least in part on the notion that even a temporary "interruption in [the] capacity to work" is impermissible under the statute. App. 12a. There is simply no basis for such a conclusion.

the national security. App. 25a-33a; see *id.* at 49a-54a. But those cases are inapposite because they deal with a fundamentally different type of inquiry. Whether a particular individual is a security risk is an inquiry to which individualized hearings are well suited and perhaps essential. With respect to employment conditions, however, the nature of the inquiry is completely different. By deciding to impose bond conditions aimed at reducing unauthorized employment, INS was making a *policy decision* that, as a general matter, the continued illegal employment of aliens, even after they have been arrested on probable cause and are awaiting deportation proceedings, is a problem warranting invocation of the Attorney General's discretionary authority. This is an issue peculiarly well-suited to decision by rule. Under the court of appeals' analysis, INS would presumably be required, in individual evidentiary proceedings, to pass in each case on the likelihood that the illegal employment of a particular alien would have an adverse effect on employment opportunities. Such a burdensome and quixotic requirement finds no support in the language or history of 8 U.S.C. 1252(a)(1).

The error of the court of appeals' ruling is even more apparent in light of the fact, noted above, that the regulations *do* provide for individualized determinations, and thus at most establish a rebuttable presumption—*i.e.*, that employment pending deportation is not permitted unless the alien can make a showing of existing authorization to work, or of circumstances warranting temporary authorization. The use of such a presumption and the consequent requirement that the alien bear the burden of proving otherwise is consistent with a long line of administrative law decisions. See, *e.g.*, *Heckler* v. *Campbell*, 461 U.S. 458 (1983); *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).[22] The court of appeals offered no

[22] Cf. *American Hospital Ass'n* v. *NLRB*, 899 F.2d 651 (7th Cir. 1990), cert. granted, 111 S. Ct. 242 (1990) (No. 90-97).

reason why such an approach is improper under the INA, apart from its own *ipse dixit* that bond conditions *must* be based on individualized proceedings, unaffected by rule.

* * * * *

The court of appeals has fundamentally misconstrued the Immigration and Nationality Act. It has invalidated a reasonable and important enforcement mechanism that is completely consistent with the language and purposes of the INA, and has imposed a novel requirement that the Attorney General's discretionary authority regarding detention and bond conditions can only be exercised in individualized proceedings. Because INS is foreclosed from litigating this issue further before other courts, review in this Court is essential to correct these errors.

CONCLUSION

The petition for a writ of certiorari should be held for *McNary* v. *Haitian Refuge Center, Inc.*, No. 89-1332, and disposed of in light of the Court's decision in that case.

Respectfully submitted.

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JANUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20268